No. 89-2029

In The

Supreme Court of the United States

October Term, 1989

SHELL OIL COMPANY,

Petitioner,

vs.

RAYMOND J. LEONARDINI,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Are the safeguards and standards of California punitive damage law constitutional when applied to the *intentional* tort of malicious prosecution where a unanimous jury and a unanimous appellate court found Shell Oil intentionally and maliciously abused the court system as part of a concerted effort to silence opponents' speech on fundamental public policy issues of health and safety then being debated before California governmental bodies and in the public forum?

2. Is a punitive damage award equal to two hours of defendant's sales constitutionally "grossly excessive" when viewed against the reprehensibility of Shell's conduct which the California appellate court found "strikes at the very heart of the democratic process?"

3. Can Shell Oil raise, for the first time before this Court, the issue of "burden of proof" when it offered the very same instruction given to the jury on burden of proof?

PARTIES

The only respondent party to this action is Raymond J. Leonardini. While an attorney representing a client in the underlying action, he was sued individually by the Shell Oil Company and, in turn, brought this action for malicious prosecution individually against the Shell Oil Company.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

Raymond J. Leonardini files this opposition to the Shell Oil Company ("Shell") petition for writ of certiorari to review the decision of the Court of Appeal of the State of California, Third Appellate District ("Opinion").*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are reprinted in the Appendix as Items A, B, C and D.

* Page references to the "Opinion" are as numbered in the Appendix to the Petition for cert; "CT" refers to the Clerk's Transcript; "RT" refers to the Reporter's Transcript.

STATEMENT OF THE CASE

INTRODUCTION

Shell filed what has become known in law and politics as a SLAPP suit.[1] It did so as part of its strategy to

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[1] According to the authors of a National Science Foundation study:

> Every year hundreds, perhaps thousands of civil lawsuits are filed in the United States whose sole purpose is to prevent citizens from exercising their political rights or to punish those who have done so . . . .
>
> We call these cases 'Strategic Lawsuits Against Public Participation' or SLAPPS, attempts to use civil tort actions to stifle political expression . . . .
>
> * * *
>
> They need not go to trial to be 'successful.' Their intimidation or chilling effect occurs upon filing, or even the threat of filing . . . .
>
> * * *
>
> The most common setting that led to a SLAPP in our sample was also the simplest. One party approaches some governmental body or office about a matter affecting some other party. The other party then filed a lawsuit against the first party. This pattern occurred in 71 percent of our cases.
>
> * * *
>
> Even though SLAPPS may be cases of muscle flexing to regain private economic advantage, the fact that political repression is their manifestation and the courts are their vehicle threatens to undermine confidence in democratic principles. That political repression can masquerade as torts, can involve the judiciary in its operation, and yet be difficult to identify makes it all the more pernicious.

Canan and Pring, *Strategic Lawsuits Against Public Participation* (University of Denver College of Law, Political Litigation Project 1988); *See*, Pring and Canan *Litigation to "Chill" Public Interest Advocacy* (University of Denver College of Law, Intimidation Lawsuit Project 1986).

discourage or punish political participation by those who would question the public health and safety, before governmental bodies and in public forums, of Shell's campaign to obtain governmental approval for the use of plastic pipe to carry drinking water into the homes of 20 million Californians.

Ironically, before this Court, Shell claims a first amendment right to silence, by injunctive prior restraint, one's too effective political opponents in a public debate.[2] Such suppression of political speech has never been sanctioned by this Court in the 200-year history of the Republic and should not be encouraged by the granting of certiorari here.

– THE FACTS – WHAT SHELL DID –

In the midst of a national debate, centered before public bodies in California, concerning the public health and safety of unrestricted use of plastic pipe to transport drinking water in homes, Shell sued to silence its most effective political opponent and his scientific advisors. It did so as part of a deliberate and concerted plan of intimidation, deceit and misrepresentation, and to thwart discovery of serious health risks known to it – but hidden from the State of California – to exist in the advocated plastic pipe system.

To quote the *unanimous* Opinion of the court of appeal, upholding a *unanimous* jury verdict:

---

[2] "The freedom of expression protected by the first amendment embraces not only the freedom to communicate particular ideas, but also the right to communicate them effectively." *United States v. Eichman, et al.*, ___ U.S. ___; 58 L.W. 4744, 4747 (1990) (dissenting op. Stevens, J.).

> [T]he jury determined that Shell was guilty of maliciously bringing a lawsuit against plaintiff to silence and muzzle him. . . . Shell engaged in a continuous course of conduct to thwart the open governmental process of resolving conflicting claims on a subject of marked public interest. . . . Shell's conduct threatened the indispensable rights of all citizens to appear before their government and to speak out in matters of public health and safety without fear of legal retaliation . . . . The pattern of reprehensible conduct also involved a continuous misrepresentation of the nature and safety of the polybutylene pipe system. This pattern, . . . included the continuous threat of litigation against anyone who dared make any adverse comment about the polybutylene pipe system as well. The use of a superior fiscal position to silence opposing voices in public debate by the misuse of the legal process strikes at the very heart of the democratic process. Given this record, the jury could reasonably find that Shell's conduct was extremely reprehensible. As we have noted, Shell's management, the 'boys in Houston,' perceiving that the company was being hurt economically, decided to play 'hardball' in their effort 'to dampen or quiet these kinds of outspoken statements.' The game Shell elected to play was a legal game and the object of its suit the suppression of speech.

Shell does not make polybutylene pipe. Nor does it make the "fittings" critically necessary to join pipe together in a home's drinking water system. However, as the maker of a resin used by "extruders" to manufacture pipe, it perceived its economic interest in gaining approval throughout the United States, including California, of governmental bodies for a plastic drinking water system.

In the Spring of 1980, Shell sent its own representative to tell California public health officials that the advocated system was "100 percent safe," (RT 1194:1-7; 1137:24-27; Trial Exhibits 18 and 20) was solely "polybutylene," (RT 1380:19-1381:20) which polybutylene was made up of only three ingredients, (RT 1378:14-1381:20) and needed no independent testing by state officials charged with the responsibility of protecting the health and safety of Californians. (RT 1379:19-1380:18) These representations were false, and Shell, of course, knew it.

In fact, Ray Leonardini's testing, as Shell was later forced to admit (RT 1413:11-24; 1089:3-28; 1621:23-26), revealed that the resin that goes into polybutylene contains a BHT chemical. (RT 1423:18-1424:4) In early 1980, there was a growing level of concern about the antioxidant BHT and studies reported in scientific literature found that it promoted or accelerated tumor development and was then under review by the FDA. (RT 1392:6-21) Further, no independent testing of a polybutylene system had ever been done by anyone, before Ray's testing, to conclude it was "100 percent safe." (RT 2102:18-2103:2) Of critical importance, part of the system, the "fittings," without which there could be no system, were not polybutylene at all but a "polyacetal" made from molecules of formaldehyde – a trioxane – a known carcinogen that breaks down in a water system and in the human stomach. (RT 1560:16-1562:12; 1462:15-1463:2; 1465:1-20) Shell would withhold this information from state officials until it came out at the trial in this case. (RT 1470:4-10) In fact, in furtherance of this course of conduct, Shell had entered into a secret agreement, also denied until disclosed in this case, with the Celanese Corporation of America – the makers of the polyacetal Celcon fittings – which specifically called for the withholding of information regarding these polyacetal fittings from the California public officials then investigating the health and safety of the

proposed, misrepresented system. (RT 1583:6-1584:22; Trial Exhibit 31)[3]

Ray Leonardini, a former Jesuit priest and public official, then a conscientious young attorney representing a client before public bodies on critical public health policy issues, working with scientists and state consultants, had made important discoveries concerning the dangers of PVC and CPVC pipe. (RT 1057:10-1060:20) His earlier discoveries resulted in the State of California doing independent health studies through an EIR process, rather than relying upon manufacturers' representations that their pipes were also "100 percent safe." (RT 1091:24-1092:22) Thereafter, he turned his attention to polybutylene plastic pipe and what everyone had been told was a completely polybutylene pipe system. (RT 1112:2-12)

Ray again hired qualified scientists, Cal Lab, a reputable lab regularly used by the Shell Oil Company (RT 1679:1-8), to first, independently test *pipe* (not resin) manufactured by various companies – but not Shell. The tests, dated December 31, 1980, on pipe manufactured by Westflex Manufacturing Company of Richmond, California, (Trial Exhibit 13; RT 2300:2-12) found high levels of DEHP *and* BHT. (Trial Exhibit 13) This represented the first time anyone in the United States had independently tested a polybutylene pipe. (RT 2102:18-2103:2) The accuracy of these tests was verified by the state through the California Air Resource Laboratory. (RT 1128:1-1129:2) Next, Ray had the *fixtures* tested, the flexible pieces of tubing that go under the sink in a home water system. Again, the

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[3] In addition to the polyacetal toxic problem, Shell was also hiding massive mechanical failures of whole subdivisions fitted with the system throughout the United States. (RT 1611:24-1612:14; 1617:16-1618:2; 1989:4-1992:5; 1993:2-1994:3; 1999:14-23) Not only did the system with the Celcon fitting leech formaldehyde and trioxane into a water system at dangerous levels (RT 1462:15-1463:2), it didn't work!

tests, dated March 18, 1981, found DEHP and BHT in all four samples. (RT 1513:26-1514:5) The only part of the system not tested by Ray, before August, 1981, when Shell sued to stop him and Cal Lab, were the fittings.[4] Ray and the State of California were one test away from discovering the truth: the *polyacetal* fitting which Shell's own internal memo called the "albatross" of the system (RT 1617:16-1618:2); that was the subject of a secret agreement with the Celanese Corporation; which would have set off "alarm bells" with state health officials, had they known. (RT 1445:8-1446:11) Shell had no intention of telling them. (RT 1588:5-27)

When a powerful state legislator suggested the system advocated by Shell should undergo the independent testing required of other plastics, Shell and its legal staff

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[4] Shell's test in response, done on water delivered to a lab by Shell, was on *water* alleged to have been in contact with pipe not on *pipe* itself. (RT 2432:28-2433:9) Shell misrepresented the results to the State. (RT 1416:20-1421:8) Similarly, a number of other Cal tests were on water, not pipe (RT 1275:8-1276:1), or on pipe manufactured by other manufacturers. (RT 1284:20-1285:13) It is undisputed that the BHT found and disclosed for the first time by Cal Lab's tests is in Shell's resin, although Shell had denied this until Ray's testing. (RT 1089:3-28) Cal's miscellaneous other tests that were not remarkable were in fact made known to the State's health officials by Ray. (RT 1273:1-3; 1284:1-5; 1276:15-16) Finally, Ray never said anything about Shell's product, resin. (RT 1162:4-7) He explained the probable source of DEHP as a contaminant in the extruding process by manufacturers. (RT 1163:21-1165:20) Shell's own representative knew that, while improper, extruders were regrinding other pipe and mixing it in with Shell's resin. (RT 1996:1-1998:8) There was no quality control on manufacturers. (RT 1744:24-1745:3) Ray certainly never said that polybutylene pipe causes cancer as suggested by Shell; and at all times advocated *only* complete and independent testing by the State of California before the unrestricted use of plastic pipe be permitted to carry drinking water. (RT 1091:7-23)

threatened to sue him if he did not desist. (Trial Exhibit 3; RT 1074:17-1078:14) Shell assured its local representative that "they had a battery of attorneys to handle people like that and they'll turn it over to their legal department." (RT 2003:10-23) When the state's own consultant suggested the need for further study because the toxicity information was incomplete, he was warned by Shell to stop making such further public comments on the matter of public controversy. The warning came from Dr. Schimbor, the head of polybutelene at Shell, with copies to Shell's legal counsel and the state official's superior. (RT 1432:5-20; RT 1421:3-20, Trial Exhibit 29)

By April, 1981, the state decided, after giving Shell a full opportunity to be heard, (RT 2093:12-17; 1671:20-1672:1) that public health and safety required independent testing. The public debate, however, including the protocols – what and how to test – raged on. Shell knew that unless the right tests were done, and on the whole system, the secret of polyacetal would remain unknown to public officials. The testing then proposed, and later carried out, was *not* such as to discover the formaldehyde secret. (RT 1468:16-1469:27)

Meanwhile, at Shell, "some boys in Texas" were getting upset. They decided Ray had to be stopped:

> Mr. Schimbor was very emphatic about doing whatever was necessary to see if they could eliminate Mr. Leonardini and his tenaciousness from the hearings. (RT 2008:4-2009:11)

He was "too effective" (RT 2002:2-22) and they had decided to play "hardball." (RT 1430:24-1431:10) They "hated his guts." (RT 2008:4-17; 2008:18-2009:11) Later, after the suit was filed, the same local attorney who represented Shell before the state agencies and whose firm filed the lawsuit, would apologetically explain to the primary state health official that the suit was not his doing, but was:

> The work of a group of lawyers in Houston and that the group in Houston had really insisted on it. (RT 1436:17-1437:6)

At trial, neither Shell's lawyers in Houston nor its local counsel were permitted, by Shell, to be deposed or called as witnesses. Instead, Shell asserted the attorney/client privilege and specifically withdrew "advice of counsel" as a defense to the malicious prosecution action.

So, Shell sued Ray – individually, not his union client – and they sued Cal Lab supposedly for an injunction and declaratory relief. But Shell, from President Street on down, knew that no court in the United States had ever prevented speech on a matter of public concern. (RT 2091:6-13) It knew it made no legal or logical sense to "ban" a report already legitimately part of a governmental proceeding – a public record – on a matter of public health and public policy. (RT 2094:12-24; 2097:24-2098:3) It knew that anyone in the world (except Ray?) could obtain or discuss the public record. In fact, Shell sent a letter nationally to anyone interested in the public debate stating:

> All this information is part of the public record and is available to anyone who wishes to write us. (Trial Exhibit 17; RT 1172:24-1174:20)

But a ban is what it professed to want. (RT 1670:10-25) Apparently, Shell wanted the public to read only its side of the debate in the public record.

Immediately upon filing the suit, the "irreparable harm unless restrained" and the need for a temporary restraining order to stop Ray speaking publicly or to public officials disappeared. Instead, a public relations release immediately issued nationally from Houston, Texas, announcing the federal lawsuit against Ray Leonardini and the lab that had performed tests submitted to the public agencies in California. (RT 1552:6-16) Then followed a letter to the public body advising it that the "only" basis for independent testing was Cal Lab's

tests and that the "Shell Oil Company had instituted an action in a United States District Court to enjoin any further publication of such erroneous information." (Trial Exhibit 20; RT 1181:22-1183:2)

Next, Shell's legal staff applied economic coercion to the independent laboratory upon which Ray relied to try to force it to give a statement to "neutralize" Ray in the ongoing political debate. (RT 1924:13-20; RT 1946:12-23) Shell's lawyers made clear the suit had nothing to do with seeking legal relief, but was being used to intimidate and extract concessions to influence the public debate and the governmental decision making process. (RT 1948:23-28)

Unfortunately for Shell, it soon found it was riding the back of the tiger. The little independent laboratory, even in the face of Shell, would not compromise its integrity and admit anything was wrong with its tests submitted to and verified by the state. (RT 1861:3-19; 1925:24-1926:1) Ray's attorney was demanding unconditional dismissal of the constitutionally untenable suit. (RT 1801:6-9; CT 39-40) Finally, Shell took whatever statement it could get from Cal Lab. Cal Lab was completely vindicated. (RT 1933:13-1934:13) Three days before Ray's motion to dismiss was scheduled to be heard, Shell dismissed the federal action. Judgment with prejudice was entered in his favor. (CT 61)

But, as the court of appeal Opinion correctly observed, Shell's abusive tactics were effective: "If Shell's purpose had been to intimidate plaintiff, it succeeded." Opinion, p. 63a. Shell is currently still attempting to obtain approval of polybutylene pipe system for the drinking water of Californians – and Ray Leonardini has effectively been removed from the process by Shell's abusive and malicious conduct – and now devotes much of his time to noncontroversial hospice and religious work.

REASONS FOR DENYING CERTIORARI

I.

LACK OF JURISDICTION: HOW THE FEDERAL QUESTIONS WERE *NOT* RAISED AND *NOT* PASSED UPON

Glaring in its absence from Shell's table of contents and jurisdictional statement is a clear and concise compliance with this Court's rule 14.1(h) which requires, as to the "Questions Presented for Review," the following:

> If review of a judgment of a state court is sought, the statement of the case shall also specify the *stage* in the proceedings, *both in the court of first instance and in the appellate courts,* at which the federal questions sought to be reviewed were *raised;* the *method or manner* of raising them *and the way in which they were passed upon by those courts;* and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. . . . (Emphasis added.)

Even more glaring, but understandable in light of Shell's inability to comply with rule 14.1(h), is the total absence from the California Court of Appeal Opinion of any reference whatsoever to the federal constitutional issues sought here to be reviewed. In essence, this Court is asked to review an Opinion of the California Court of Appeal on subjects not decided by said state court. This Court has correctly observed that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved

party in this Court can affirmatively show to the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969); *see, Chicago, I. & L. R. Co. v. McGuire*, 196 U.S. 128, 131-33 (1905); *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945); *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983). In *Street v. New York*, 394 U.S. 576, 581-582, this Court explained:

> The New York Court of Appeals did not mention in its opinion the constitutionality [of the statute]. . . . Hence, in order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals. . . . If the question was not so presented, then we have no power to consider it. See 28 U.S.C. Section 1257(2), 1257(3). [Citation] Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts. . . .

It is, of course, central to the jurisdiction of this Court under section 1257, that a substantial federal question has been properly raised in the state court proceedings. Stern, Gressman, Shapiro, *Supreme Court Practice*, 6th ed., sec. 3.21, p. 149. As this Court's own rule demonstrates, Shell should have raised the federal question at the outset and not as an afterthought when it lost below. Association of new counsel at the California Supreme Court level does not excuse jurisdictional requirements.

In this case, Shell never articulated any of the issues sought to be reviewed "in the court of first instance" (rule 14.1(h)) and did not brief or argue any of said issues

before losing in the court of appeal.[5] Shell conceded that the constitutionality of punitive damages was never adequately and properly presented until after it lost the case in the trial court, lost on appeal, and for the first time raised this point at the level of discretionary review by the California Supreme Court:

> One of Shell's grounds for certiorari involves the constitutionality of punitive damage assessments.[4]
>
> * * *
>
> [4] Shell adequately preserved this objection by presenting it to the California Supreme Court *in the first instance.*

Memoranda of Points and Authorities in Support of Ex Parte Application of Stephen W. Jones on behalf of defendant Shell Oil Company for Order Staying Enforcement of Judgment, p. 6, and n. 4 (filed April 17, 1990, Sacramento County Superior Court) (emphasis added).

Shell attempts to escape the jurisdictional requirement of this Court as enunciated in rule 14.1(h) by *now* suggesting to this Court that it did in fact make vague references to constitutional questions at each stage. For

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[5] Shell says, *without citation to the record,* (Petition for cert., at p. 18) that it "renewed the objections before the court of appeal." It did not, as evidenced from the Opinion of that court. If Shell means to suggest it made some reference to the constitution *after* the court of appeal decision, such belated and inadequate reference comes too late to invoke this Court's jurisdiction: "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, *unless the court actually entertains the question and decides it.*" *Herndon v. Georgia,* 295 U.S. 441, 443 (1935) (emphasis added); Stern, Gressman, Shapiro, *Supreme Court Practice,* 6th ed., at p. 155. No California court, at *any* stage, entertained or decided any of the "issues" raised here by Shell.

example, it suggests that it properly presented the issue to the trial court in a motion for new trial. Petition for cert., p. 18. In fact, the "adequate presentation" of this fundamental issue was relegated solely to a footnote in a 93-page brief suggesting that there were "important issues" that must be resolved, concerning punitive damages, in an appropriate setting under the federal *and state* constitutions. (CT 775) *Compare, Beck v. Washington*, 369 U.S. 541, 553 (1962). No constitutional argument whatsoever was presented to the trial court in the brief; no oral argument whatsoever was ever presented to said court; and no decision was made by the trial court on constitutional questions. Similarly, in the court of appeal, the issues here were not briefed, not argued, and not decided.[6] Shell is strangely silent in explaining "the way in which they were passed upon by those courts" (rule 14.1(h)), or why such courts, if in fact the issues were properly raised, did not rule upon them.

Shell further attempts to explain its failure to adequately raise such issues by suggesting that it would be fruitless to do so at any time prior to the California Supreme Court. Such a suggestion, that issues need not be properly raised, objections properly made, and a record properly kept, prior to the time of reaching the

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[6] As noted in a leading work on Supreme Court practices: "Briefs and oral arguments before state courts are not ordinarily part of any record filed with the Supreme Court and cannot be used to establish that a federal question was raised. [Citation]." Stern, Gressman, Shapiro, *Supreme Court Practice*, 6th ed., at p. 157. As stated in *Lynch v. New York ex rel Pierson*, 293 U.S. 52, 54 (1934): "Nor can a claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record." There is thus nothing in the record certifiable to this Court showing the constitutional issues were timely and properly raised. They were not!

highest court which has previously ruled on a constitutional issue, would make a mockery of this Court's jurisdictional rules.[7] In essence, persons could apply to this Court to decide fundamental federal constitutional issues which have been previously ruled upon by this Court without ever having raised the issue below in any manner whatsoever in the trial court or the appellate court, in the state or federal system, and raise it here for the first time on the basis that only the United States Supreme Court can reverse one of its own decisions.

Such a rule is not the rule of this Court; nor is it the rule of the California courts, including the supreme court. As Shell correctly notes, the California Supreme Court refused to hear this case. As they incorrectly note, however, neither that court nor any justice thereof stated a willingness to hear all issues presented by Shell, including those constitutional issues raised for the first time at the California Supreme Court level. Indeed, California has rules similar to this Court wherein the Supreme Court of California is constitutionally limited in its function to reviewing the *decisions* of the courts of appeal. Cal. Const., art. 6, sec. 12(b) (Appendix A). In furtherance thereof, California Supreme Court rule 29 (Appendix B) precludes the raising of issues for the first time in the California Supreme Court that have not been timely briefed and raised in the court of appeal.

In "Answer to Petition for Review" in the California Supreme Court, respondent Raymond Leonardini raised

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[7] Compare the diligence of petitioner, in the face of adverse Alabama precedent, to comply with rule 14.1(h) in *Haslip*: "Pacific Mutual raised its constitutional challenges to an award of punitive damages at the answer stage, preserved such issue at trial and vigorously advanced those issues on appeal, in its briefs, at oral argument, in the post-trial letter briefs and in its petition for rehearing." And, the Alabama Supreme Court passed on the federal constitutional challenges. Petition for cert., at p. 4; *Pac. Mut. Life Ins. Co. v. Haslip*, No. 89-1279.

exactly these points to the Supreme Court of California, pointing out, as he does here, that the constitutional federal due process issues now being raised had never been adequately, timely and properly raised. As stated to the California Supreme Court:

> At *trial* in this matter, Shell [CT 517; 555] submitted instructions asking for the normal 'preponderance of the evidence' civil standard on all issues including damages. Shell submitted instructions providing for a non-unanimous civil verdict. [CT 521; 552] In fact, the jury verdict was unanimous. [CT 629; RT 2697:25-26] Plaintiff submitted, and the court gave BAJI 14.71 instructing the jury on the manner of assessing punitive damages [CT 605]. Shell provided no alternative instruction.
>
> On appeal, Shell correctly notes that the Opinion of the Court of Appeal does not even mention this 'issue.' [Petition for Review, p. 30, fn. 22] Again, the reason is simple. The constitutional issue was raised by Shell for the first time in its Reply Brief, with the suggestion that *Banker's Life & Cas. Co. v. Crenshaw* (1988) 406 U.S. 71, was then pending before the Supreme Court and
>
> 'If the court reaches the merits of these issues in *Crenshaw*, Shell would consider suggesting that supplemental briefs be received. [Reply Brief, p. 31, fn. 40]' *Crenshaw* was decided and was of no avail to Shell. Accordingly, the constitutional issues were not sought by Shell to be briefed, were not properly before the Court of Appeal and were not even mentioned by Shell on oral argument before the Court of Appeal.
>
> There is no basis for this Court, especially on this record and when the Court of Appeal Opinion to be reviewed does not even discuss the subject, to accept this case to determine federal constitutional law . . . .

It was on this presentation that the California Supreme Court denied Shell a hearing. To suggest that the three Justices voting to grant the petition were willing to consider *all* issues, including the constitutional issues, is both irrelevant and a distortion of the California Supreme Court rules relating to the denial of a petition for review. It is irrelevant in the first instance because the California Supreme Court did *not* grant review of *all or any* issues. It is also a distortion of California Supreme Court rule 29.2(b). (Appendix C) *After* the California Supreme Court *grants* a petition for review, it may specify the issues to be argued and limit briefs to those issues. To suggest that when the court does *not* take a petition, any inference may be drawn to what issues might have been taken had the court determined that some or all of the issues had been timely raised is mere conjecture: "Jurisdiction cannot be founded upon surmise." *Lynch v. New York ex rel Pierson*, 293 U.S. 52, 54 (1934).

There is no opinion given by the California Supreme Court as to why it did not take the case; nor is there any opinion as to what the Justices on the losing side of the vote had in mind when they voted to grant a hearing. Clearly, given the arguments made by respondent and the total absence in the court of appeal Opinion of any of the issues sought here to be reviewed, the refusal by the California Supreme Court might well have been based upon the failure of Shell to properly raise the issues in the trial court and in the appellate court. Under such circumstances, it is generally recognized:

> Such refusal by the highest state court *might* have been based upon the adequate state grounds that the constitutional issue was not raised in the trial court, as required. And the Supreme Court feels that it is without jurisdiction 'when the question of the existence of an adequate state ground is debatable.' (Citing *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952).)

Stern, Gressman, Shapiro, *Supreme Court Practice*, 6th ed., p. 153 (1986) (emphasis added).

Clearly, reasonable state procedural requirements may not have been observed, accounting for the failure of the state courts to rule on the federal issues. This precludes review on certiorari by this court. *Stembridge v. Georgia*, 343 U.S. 541-48 (1952); *Mut. Life Ins. Co. v. McGrew*, 188 U.S. 291-309 (1903).

Nor, as suggested by Shell, did the California Supreme Court abrogate its own rule requiring the timely raising of issues in the case of *Moradi-Shalal v. Fireman's Fund Ins. Co.*, 46 Cal.3d 289, 292, n. 1; 758 P.2d 58; 250 Cal.Rptr. 116 (1988). Petition for cert., pp. 16-17. Rather, *Moradi-Shalal* merely noted that since the issue was raised for the first time in the California Supreme Court and since review *was granted* without limitation, the issue could be considered. This is no different than this Court's own rule that if, in fact, the highest state court has actually passed upon a federal question, any inquiry into how and when the question was raised in the state court is irrelevant to the exercise of this Court's jurisdiction. Stern, Gressman, Shapiro, *Supreme Court Practice*, 6th ed., sec. 322, "Effect of State Court's Determination of Federal Question," p. 158. But in *this case*, respondent Leonardini pointed out to the California Supreme Court that the issue was not properly raised, was not part of the decision to be reviewed, and therefore not properly before the California Supreme Court. The California Supreme Court, from all appearances, agreed and did not take the case for consideration. As presented to this Court, the California trial court, appellate court and supreme court have never considered and ruled upon any of the issues presented to this Court.

Finally, to the extent that Shell argues that the first amendment of the United States Constitution permits prior restraint of public debate on a public policy issue (petition for cert., pp. 19-21), this Court lacks jurisdiction to review the judgment. The California court's free speech analysis was based on the independent and adequate state grounds of the Cal. Const., art. 1, sec. 2,

subdivision (a) (Appendix D). Opinion, p. 2, n. 1. *See,* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489 (1977); O'Connor, *Our Judicial Federalism,* 35 Case W. Res. L. Rev. 1 (1984); *see also,* Falk, *The State Constitution: A More than "Adequate" Non-Federal Ground* (1973) 61 Cal. L. Rev. 273; Poswall, *The Right to Violate an Injunction,* 56 Cal. L. Rev. (1967); Poswall, *The Supreme Court of California, Injunctions,* 56 Cal. L. Rev. 1665 (1967).[8]

Petitioner Shell has not, and cannot, show that the federal question was timely and properly raised or passed upon by the California courts so as to give this Court jurisdiction to review the judgment on a writ of certiorari. Accordingly, the petition must be denied for lack of jurisdiction.

II.

SHELL'S INTENTIONAL AND MALICIOUS ATTEMPT TO SUPPRESS FREE SPEECH AS A BASIS FOR PUNITIVE DAMAGES

We agree with Shell when it states in its brief "this case differs from *Haslip* in its importance. Punitive damages were not here imposed to deter shoddy manufacturing, curtail sharp sales practices or root out insurance company misbehavior." Petition for cert., p. 3. Rather, punitive damages were here imposed for intentional and malicious conduct which had as its basis the suppression of free speech and public debate in the political process.

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[8] In any event, the Opinion *correctly* held that a prior restraint on political speech was unconstitutional under the federal constitution, *also. Near v. Minnesota,* 283 U.S. 697 (1931), *New York Times Co. v. United States,* 403 U. S. 713 (1971); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971); *Carroll v. Commissioners of Princess Anne,* 393 U.S. 175 (1968); *Bantam Books v. Sullivan,* 372 U.S. 58 (1963).

Said conduct had as its means the abuse of the court system to suppress political opponents from speaking out and chilling others who might dare. These are the unanimous findings of a jury, as independently reviewed by a trial judge, and as unanimously upheld by an appellate court. It is on this record that Shell seeks this Court's intervention.

A. Intentional and Malicious Conduct.

Justice Rehnquist, speaking in dissent in *Smith v. Wade*, 461 U.S. 30, 87 (1983), has persuasively argued that punitive damages should not be imposed against persons who are not wrongdoers, persons who mean no harm and persons who are not guilty of actual malice. In this case, Shell was guilty of all of such elements. Nor, according to the *Restatement (Second) of Torts*, sec. 909, and concurred in by California law (California Civil Code, sec. 3294(b)), should punitive damages be imposed vicariously against persons or companies who do not actively participate in the wrongdoing. Unlike the facts in *Haslip*, this case presents no such imposition. Rather, there is no question on the facts of this case, as found by the jury, that Shell, from the very top officers down to the legal department, carried out an intentional corporate policy to suppress evidence before public agencies and before courts and sought to silence any political opposition, whether public citizens or public officials, in furtherance of that corporate policy. Such a calculated and intentional corporate policy justifies the imposition of punitive damages against the corporation. *Neal v. Farmers*, 21 Cal.3d 910; 582 P.2d 980; 148 Cal.Rptr. 389 (1978).

This case is, in fact, not unlike others that have come before the Court wherein fundamental constitutional rights have been the subject of suppression and punitive damages, on standards less rigid than those used in California, have been the remedy affirmed by this Court. *Memphis Community School Dist., et al. v. Stachura*, 477 U.S.

299, 304 (1986), punitive damages were upheld; reversed on other grounds, *id.*; *Smith v. Wade*, 461 U.S. 30 (1983); *Carlson v. Green*, 446 U.S. 14, 22, n. 9 (1980); *Carey v. Piphus*, 435 U.S. 247, 257, n. 11 (1978). Indeed, this case meets the standards established by eight, if not nine, of the Justices of this Court in *Smith v. Wade*, including the dissenting opinion of Justice O'Connor wherein she stated:

> I cannot concur . . . with the suggestion that punitive damages should not be available even for intentional or malicious violation of constitutional rights . . . .

Id., p. 94. In essence, the intentional and malicious actions of Shell were designed to undermine the constitutional rights of the plaintiff and all others who would participate in democratic decision-making processes of the State of California then ongoing concerning plastic pipe and drinking water.

The tort of malicious prosecution is, by nature, an intentional tort which has, under California law, as its element, the intentional bringing of a civil action without probable cause and with malice. Opinion, p. 21a; Cal. Jury Instns., Civil, Book of Approved Jury Instructions, 7th ed. (1986) No. 7.32. As noted in *Smith v. Wade* by Justice Rehnquist in dissent, the common law of California, since at least the 1860's – and as later codified in Civil Code 3294 in 1872 – has required actual malice, wrongful intent, wanton or malicious motives, willful unjust or oppressive conduct in order to recover punitive damages. *Smith v. Wade*, 461 U.S. 30, 77-78 and n. 12 (1983).

The malice required for malicious prosecution is malice in fact. *Bertero v. Nat'l Gen'l Corp.*, 13 Cal.3d 43, 66; 529 P.2d 608; 118 Cal.Rptr. 184 (1974). Of course, the "malice in fact . . . may be proved under section 3294 either expressly (by indirect evidence probative of the existence of hatred or ill will) or by implication (by direct evidence

from which the jury may draw inferences)." *Davis v. Hearst*, 160 Cal. 143, 162; 116 P. 530 (1911); *Bertero v. Nat'l Gen'l Corp.* 13 Cal.3d 43, 66; 529 P.2d 608; 118 Cal.Rptr. 184 (1974). In addition, in order to properly safeguard access to the courts for the redress of grievances, an access which may indeed be grounded in the first amendment as noted by the California appellate court in this case (Opinion, p. 21a), California courts have severely restricted the tort of malicious prosecution. Recently, under a standard applied to this case, the California Supreme Court narrowed malicious prosecution by imposing one of the most rigorous standards in the country relating to a finding of lack of probable cause. *Sheldon Appel v. Albert & Oliker*, 47 Cal.3d 863; 765 P.2d 498; 254 Cal.Rptr. 336 (1989). But there are some cases and some defendants who will, despite the great liberality provided to them, go beyond all bounds and abuse our court system in pursuit of suppressing the very rights upon which our court system and democratic principles are founded. This is such a case. The jury in this case was instructed that the malice required for malicious prosecution was:

> The words 'malice' and 'malicious' mean a wish to vex, annoy or injure another person. Malice means that attitude or state of mind which actuates the doing of an act for some improper or wrongful motive or purpose. (CT 599)

The jury was further instructed under California law that to impose punitive damages in this case, it had to find "malice" or "oppression." These terms were specifically defined as follows:

> 'Malice' means conduct which is *intended* by the defendant to cause injury to the plaintiff or carried out by the defendant with a *conscious* disregard of the rights of others. One acts with *conscious* disregard of the rights of others when it is aware of the probable consequence of its conduct and *willfully and deliberately* failed to avoid those consequences.

The term "oppression" was defined to the jury as:

> 'Oppression' means subjecting a person to cruel and unjust hardship in *conscious* disregard of that person's rights. (CT 605; BAJI 14.71.)

Shell in its petition for certiorari quotes from the comments of federal Judge Lawrence Karlton at the time of the dismissal of this action. While such comments of Judge Karlton were specifically excluded from evidence in this case by Shell's motion (CT 296-305; RT 3:18-4:1; 18:21-19:14), respondent quotes the part left out by Shell. The federal judge, comparing Shell's actions to another maliciously prosecuted action by a large Sacramento developer against environmentalists, stated that Shell's action "reeks of corporations with great economic power in this country seeking to silence political debate." (Trial Exhibit 24)

B. California Standards for Imposition of Punitive Damages[9]

As noted earlier, the tort of malicious prosecution is strictly construed requiring intentional conduct and malice in fact. In addition, the California Supreme Court has required that the question of probable cause to bring a civil action be exclusively determined by the trial judge, not the jury. *Sheldon Appel v. Albert & Oliker*, 47 Cal.3d 863; 765 P.2d 498; 254 Cal.Rptr. 336 (1989). This practice was followed in this case and it was only after a ruling by the trial judge on the lack of probable cause of the lawsuit

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[9] Respondent notes, parenthetically, that challenges made to *California's* punitive damage statute, in the light of granting certiorari in the *respondeat superior* setting of Alabama's less rigid laws, *Pac. Mut. Ins. Co. v. Haslip*, No. 89-1279, have not received any votes of the Justices of this Court. *See, Comora v. Radell*, No. 89-1169; *Schaefer v. Gallego*, No. 89-1803; *Blue Cross of California v. Hughes*, No. 89-1607 (denial of stay of judgment, O'Connor, J.; dismissed thereafter pursuant to rule 46).

actually brought by Shell against Raymond Leonardini that the jury was permitted to decide those factual issues submitted to them.

Further, under California law, no discovery is permitted on the issue of punitive damages without first a finding, after hearing, by a court that there exists a "substantial probability" that the plaintiff will prevail on such issue. Civil Code, sec. 3295(c). At the trial itself, as in this case, no evidence of wealth of the defendant is admissible until the plaintiff put on his case and satisfied the trial judge that a sufficient showing had been made of intentional and oppressive conduct permitting the imposition of punitive damages. Civil Code, sec. 3295(a).[10]

On the standards for the imposition of punitive damages, California law is not only contained in Code of Civil Procedure, sec. 3294, but in over 140 years of common law. *Wilson v. Middleton*, 2 Cal. 54 (1852), and was codified in Civil Code, sec. 3294, in 1872, *Grimshaw v. Ford Motor Co.* 119 Cal.App.3d 757, 807; 174 Cal.Rptr. 348 (1981). The principles that guide the courts of California and which are incorporated in the standards given to the jury, have been described as:

> [E]stablished principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. [Citation] Another relevant yardstick is the amount of compensatory damages awarded;

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[10] In the trial below, Shell made no motion to bifurcate the issue of punitive damages from the malicious prosecution liability issue. This generally recognized practice is now codified by statute giving the defendant the absolute right to such bifurcation under California law. Civil Code, sec. 3295(d).

> in general, even an act of considerable reprehensibility will not been seen to justify a proportionately high amount of punitive damages if the actual harm suffered thereby is small. [Citation] Also to be considered is the wealth of the particular defendant; obviously, the function of deterrents . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.

Neal v. Farmer's Ins. Exch., 21 Cal.3d 910, 928; 582 P.2d 980; 148 Cal.Rptr. 389 (1978). In requiring that each of these elements be taken into consideration by the jury, the standards in California go beyond those enunciated by the American Law Institute in the *Restatement (Second) of Torts*, sec. 908.

Of course, a California jury is vested with discretion, subject to the trial judge's review on motion for remittitur or new trial (Code of Civil Procedure, sec. 657(5)), and appellate review, in weighing the reprehensibility of the conduct, determining the amount of punitive damages that will have a deterrent effect in light of the defendant's financial condition, and insuring a reasonable relationship between the general damages and the punitive damages. But that is ultimately what the jury system is about and, frankly, those who would so limit discretion as to eliminate it altogether, simply show a distrust of the American jury system and the development of the common law. Shell, in its petition, cites part of *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 388; 202 Cal.Rptr. 204 (1984). They fail to add the rest of the quotation by the learned court:

> We have examined a number of appellate decisions in an effort to determine whether we could discern from the cases a single formula for

> calculating punitive damages. For those with a mathematical bent, the attached appendix reflects part of our research. Frankly, we are unable to find that formula. Instead of making a mathematical breakdown, we discovered what everyone probably already knew: the formula does not exist. *And, we have concluded, that is properly so.*
>
> Although we may now live in a highly computerized society, it is important to recognize the justice system need not and should not mirror a mechanistic view of life. The life of the law should continue to be experience. The concept of justice connotes a human process, performed by judges and juries in good faith, exercise with compassion, still tinged with sufficient subjectivity to conform the rules of law to the realities of life.

Id., at 388 (emphasis added).

Justice O'Connor, in *Browning-Ferris Industries, et al. v. Kelco Inc., et al.*, 492 U.S. ___; 106 L.Ed. 2d 219, 254; 109 S.Ct. 2909 (1989) (dissenting) quoting Blackstone, recognizing the same concept as the *Devlin* court:

> [T]he *quantum*, in particular, of pecuniary fines neither can, nor ought to be ascertained by an invariable law. The value of money itself changes from a thousand causes; and at all events, what is ruin to one man's fortune, may be a matter of indifference to another's. 4 Blackstone, *Commentaries*, 371.

Given the innumerable combinations of circumstances that may come into play when punitive damages are sought, *i.e.*, a section 42 *U.S.C.* 1983 action for the torturing of a civil rights worker; the knowing placement on the market of a dangerous product; a fraudulent business practice; or the intentional, deliberate and malicious abuse of the court system to thwart fundamental free speech rights and public participation in government – it

is neither possible nor desirable to so restrict punitive damages or the role of the jury so as to undermine both. Ultimately, due process has to do with fundamental fairness and the guarantee that each party has "the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

III

IS TWO HOURS OF SALES A "GROSSLY EXCESSIVE" PUNITIVE DAMAGE AWARD FOR WHAT SHELL DID?

Shell had that opportunity to be fairly judged and was found to have acted in an extremely reprehensible manner that "strikes at the very heart of the democratic process." Opinion, p. 66a. Shell was further found to have caused substantial damage to the plaintiff himself who suffered immensely by reason of this abusive use of the court directed to punish him in the exercise of his free speech rights as an effective advocate in public debate. Faced with determining the appropriate amount of punitive damages that would have a deterrent effect, the jury had before it extensive evidence of Shell's financial condition, sales, earnings and profits. (RT 2105-17) Having been cautioned to maintain a reasonable relationship between the general damages awarded and the punitive damages while at the same time imposing a sufficient punitive award to "send a message" to Shell and others to deter such reprehensible conduct in the future, the jury acted conservatively. While the award of punitive damages represented 25 times the general damages and is a large sum of money, it, in fact, represented only 1/25th of one percent of the net worth of Shell and accounted for only two hours of sales by said company! Is this really so much, as to be called constitutionally impermissible and "grossly excessive," to preserve and protect free speech and our basic democratic principals of participation in government? Can anyone, on the reprehensible conduct

of Shell in this case, state that the California standards as applied to such conduct was unreasonable? Unfortunately, to Shell, with $12.5 billion of net worth, the "message" may be so nominal as to go unheeded: "What is ruin to one man's fortune, may be a matter of indifference to another's." 4 Blackstone, *Commentaries*, p. 371.

While the due process clause may forbid civil damage awards that are "grossly excessive" or "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable", (*Browning-Ferris v. Kelco Disposal*, 492 U.S. ___; 106 L.Ed.2d 219, 241-42; 109 S.Ct. 2909 (1989) (concurring opinion of Brennan, J., in which Marshall, J., joined)) this is not such a case.

IV

AT NO TIME, EXCEPT BEFORE THIS COURT, HAS SHELL RAISED THE BURDEN OF PROOF ISSUE. THE EXACT INSTRUCTION ON BURDEN OF PROOF GIVEN TO THE JURY WAS SUBMITTED BY SHELL.

As we have noted in the jurisdictional section, none of the issues presented in the petition for certiorari by Shell are the subject of the Opinion of the court of appeal seeking to be reviewed by this Court. Ironically, Shell asks this Court to overrule an Opinion on grounds that can nowhere be found mentioned in the Opinion.

In its petition for certiorari, Shell, for the first time before this Court, asserts: "A third constitutional issue bearing upon the imposition of punitive damages is the proper standard of proof." Petition for cert., p. 14. Apparently consistent with its argument that it may raise issues for the first time in the California Supreme Court that were never raised in the trial court or in the appellate court and are not the subject of the appellate court opinion, Shell apparently believes it can raise issues for the first time in this Court with the same logic that only this Court ultimately can decide constitutional issues. Such logic on the part of Shell makes a total mockery of this Court's rule 14.1(h).

It is further inappropriate for Shell to suggest to this Court that the issue of burden of proof is properly before it when in fact the exact instruction on burden of proof of which Shell apparently complains, BAJI 2.60, was submitted and specifically requested by Shell to be given to the jury. (CT 513-517; 555; 595) If it was error, it was *invited* error. In fact, if it was error, it was error *requested* by Shell. Shell can hardly complain – for the first time in this Court having never been heard in the court of appeal or the California Supreme Court on this point – that a different standard than that requested by Shell itself should have been used by the jury.

CONCLUSION

The California appellate court opinion represents a victory for free speech on important public policy issues and public participation in governmental decision making. It also is a vindication of our court system against those who would abuse it. There is no basis – indeed, no jurisdiction – on this record for this Court to reach down and decide issues never properly raised and never decided by a single level of the California court system in this case – the trial court, the appellate court, or the

supreme court. Nor is there any basis on this record for this Court to leap to the defense of Shell in its calculated, intentional and reprehensible behavior that so threatens the basic tenants of political debate historically protected by this Court.

DATED: July 23, 1990.

Respectfully submitted,

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APPENDIX A

CALIFORNIA CONSTITUTION

Art. 6, Section 12. Supreme Court; transfer of causes

* * *

(b) The Supreme Court may review the decision of a court of appeal in any cause.

(c) The Judicial Council shall provide, by rules of court, for the time and procedure for transfer and for review, including, among other things, provisions for the time and procedure for transfer with instructions, for review of all or part of a decision, and for remand as improvidently granted.

. . . .

(Added Nov. 8, 1966. Amended Nov. 6, 1984, eff. May 6, 1985.)

APPENDIX B

CALIFORNIA RULES OF COURT

Rule 29. Grounds for review in Supreme Court

(a) [Grounds] Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

(b) [Limitations] As a matter of policy, on petition for review the Supreme Court normally will not consider:

(1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal;

(2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing. All other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing.

As amended, eff. Jan. 1, 1983; May 6, 1985.

APPENDIX C

CALIFORNIA RULES OF COURT

Rule 29.2. Issues on review; grant and hold

(a) [Decision on limited issues] On review of the decision of a Court of Appeal, the Supreme Court may review and decide any or all issues in the cause.

(b) [Specification of issues] After granting review of a decision of a court of Appeal, the Supreme Court may specify the issues to be argued. Unless otherwise ordered, briefs on the merits and oral argument shall be confined to the specified issues and issues fairly included in them.

(c) [Grant and hold] After granting review of a decision of a Court of Appeal, the Supreme Court may order action on the cause deferred until disposition of Another cause pending before the court.

Adopted, eff. May 6, 1985.

APPENDIX D

CALIFORNIA CONSTITUTION

Art. 1, Section 2

Sec. 2. (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

. . . .